No. 11736

In the United States
CIRCUIT COURT OF APPEALS
for the Ninth Circuit

E. ROYCE, B. ROYCE and A. H. WENCK,
doing business as Gray Line Tours,
Appellants,

vs.

CLARK SQUIRE, Collector of Internal Revenue
for the District of Washington,
Appellee.

BRIEF FOR APPELLANTS

Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division

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JURISDICTION

During the period October 1, 1941 through September 30, 1944, Appellee assessed against Appellants transportation taxes, penalties and interest in the total amount of $16,423.51, and Appellants paid the assessment to the Appellee. The taxes were purportedly as-

sessed under Sec. 3469, *Title 26, U.S.C.A., (Internal Revenue Code),* as added to the code by the "Revenue Act of 1941" and subsequent amendments thereto. (Tr. 3).

On November 30, 1944, Appellants filed with the Appellee a claim, properly and duly prepared upon the prescribed form, for a refund of the $16,423.51, together with interest, as provided by Sec. 3471, *Title 26, U.S. C.A., (Internal Revenue Code)* (which Section was heretofore erroneously stated as Sec. 322). The Commissioner of Internal Revenue of the United States rejected this claim for refund on the 19th day of June, 1945. (Tr. 25).

On April 2, 1946, the Appellants filed with the District Court of the United States for the Western District of Washington, Southern Division, their complaint wherein they pray for a judgment against the Appellee in the principal sum of $16,423.51, together with interest as provided by law (Tr. 2-4), and on July 22, 1946, the Appellee filed his answer to the complaint (Tr. 6).

Jurisdiction of all cases arising under the Internal Revenue Laws of the United States (including this case) is conferred upon the District Court by *Sec. 41, (5), Title 28, U.S.C.A. and Sec. 3800, Title 26, U.S.C.A.*

On June 16, 1947, the District Court (Leavy, J) made and entered its final judgment against the Appellants (Tr. 38-39).

Jurisdiction to review judgments of the district courts, in cases such as this, is conferred on this court

by *Sec. 225 (a), Title 28, U.S.C.A.*

Timely notice of appeal and Bond on Appeal were served on the Appellee and duly filed (Tr. 40, 41).

STATEMENT OF THE CASE

During the times involved in this case the Appellants were engaged, at Seattle, Washington, in the business of transporting passengers in motor vehicles under the firm name and style of "Gray Line Tours, and the Appellee was and now is the United States Collector of Internal Revenue for the District of Washington. During all said times the Appellants had a contract (Ex. 1) with the United Air Lines Transportation Corporation to provide surface transportation services for air passengers of the United Air Lines, and the Appellants also had similar arrangements or oral contracts with Northwest Airlines and Pan-American World Airways (Finding VII, Tr. 26). From October 10, 1941 through September 30, 1944, seven passenger limousines were used by the Appellants in providing said service, and these are the only vehicles with which we are concerned in this case (Tr. 26).

Appellee assessed and collected transportation taxes from Appellants on the theory they were operating the said limousines "on an established line" within the meaning of *Sec. 3469, I.R.C.* Appellants instituted this action against the Appellee to recover the amounts collected, alleging that their said limousines "were not operated on an established line" (Tr. 3).

On the 1st day of May, 1947, this action was tried to the court without a jury. Witnesses were sworn and testified on behalf of the appellants, and the appellants introduced documentary evidence. A witness was sworn and testified on behalf of the appellee, and the appellee introduced documentary evidence. All the exhibits introduced are now in the possession of the clerk of this Court. Throughout the trial the appellants contended that the limousine service they provided did not amount to operating motor vehicles "on an established line" within the meaning of *Section 3469 (a)* of the *Internal Revenue Code,* which, as originally enacted, read as follows:

> "*Transportation*—There shall be imposed upon the amount paid within the United States, on or after October 10, 1941, for the transportation, on or after such effective date, of persons by rail, motor vehicle, water, or air, within or without the United States, a tax equal to 5 per centum of the amount so paid. Such tax shall apply to transportation by motor vehicles having a passenger seating capacity of less than ten adult passengers, including the driver, only when such vehicle is operated on an established line."

(The per centum figure in the quoted statute was raised by amendments from 5 to 10 and from 10 to 15 within the period October 1, 1941 through September 1, 1944. No other change was made in the quoted portion of the statute within said period.)

The trial court made Findings of Fact in which it included only a portion of the facts bearing upon the question of whether or not in providing such limousine

service the Appellants were operating their said limousines on "an established line" within the meaning of the last quoted Section of the Internal Revenue Code. These findings are set forth as Paragraphs VIII through XVI of the Findings of Fact (Tr. 26-31). These findings omitted uncontroverted, important, material and ultimate facts bearing upon this question. These omitted facts are set forth in subparagraphs 1 to 15, inclusive, of the first objection to the Court's said findings (Tr. 34-37) and in Specification of Error II of this brief. (The Transcript pages set forth on Transcript pp. 34-37 after each of the said omitted facts refer to pages in the Reporter's type-written Transcript, which pages, however, are indicated by insertions in the printed Transcript of Record. The page references made to an omitted fact in Specification of Error I are to pages in the printed Transcript of Record.)

The trial court found and concluded that the Appellants were operating the limousines "on an established line" within the meaning of said Section of the Internal Revenue Code, and basing its judgment on said finding dismissed Appellants' complaint with prejudice.

The Appellants contend that inasmuch as the trial court undertook to make detailed Findings of Fact, it should have included in its Findings of Fact the omitted uncontroverted facts to which reference was above made. And, as in the trial court, the Appellants contend that the transportation services they provided during the said period did not amount to operating their said limousines on "an established line" within the meaning of said Section of the Internal Revenue Code.

Based on the general proposition that the furnishing of said limousine service did not amount to an operation of motor vehicles "on an established line" within the meaning of *Sec. 3469, I.R.C.*, the Appellants also contend: (1) said transportation service was specifically exempt from taxes imposed by said section; (2) that Appellants were not and are not liable for transportation taxes under the provisions of said section; (3) that the assessment and collection of said purported taxes, penalties and interest were and are illegal; and (4) that the Appellants' complaint should not have been dismissed.

In deciding this case the Court treated *Regulation 42, Sec. 130.58* as though it had the force and effect of law, and the Appellants contended at the trial and now contend that said Regulation does not have such force and effect.

During the trial the Appellee offered in evidence Exhibit No. A-1 (which is Pre-Trial Exhibit 14), which Exhibit is an inter-office communication of the United Air Lines, and the court received the said Exhibit in evidence over the objection of the Appellants that there was no evidence to show that the Exhibit was ever brought to the attention of the Appellants or that they ever had any knowledge of it or that it was intended for them to act upon and that it was hearsay as far as the Appellants are concerned (Tr. 59 to 63).

SPECIFICATION OF ERRORS

I.

The trial court erred in admitting in evidence Appellee's Exhibit A-1 (Pre-Trial Exhibit 14) over the Appellants' objection based on the following grounds:

> "This Exhibit A-1 we object to on the ground that it is irrelevant and incompetent, and immaterial; on the further ground that it purports ('purports' and not 'supports' was the words used as shown on p. 16 of Reporter's Transcript of Proceedings) to be an airline inter-company communication. No evidence has been shown that it was ever brought to the attention of the plaintiffs or that they ever had any knowledge of it, or that it was intended for them to act upon, and on those grounds we object to it.
>
> The Court: Did you save an objection in the pretrial—
>
> Mr. Jones: General objection, if the Court please, on page 10, subject to any and all other objections, the general objections. Also on the ground that it is hearsay as far as the plaintiffs are concerned." (Tr. 62,63).

Exhibit A-1 is an office communication of the United Air Lines now in the possession of the clerk of this court. By an order of this court Appellants were relieved from the duty of printing the Exhibits. They do not have a copy of the form upon which the Exhibit was typed but the body of the Exhibit is as follows:

> "Our limousines when enroute from the Airport to the City of Seattle take Airport Way, Highway US 99, to Dearborne Street. It will then go to any

hotel within an area west to First Avenue; north to Virginia Street; and east to Ninth Avenue. This will include service to practically all the downtown hotels.

When traveling from the city to the Airport it picks up at the Olympic Hotel and the Traffic Office. The limousine takes Fourth Avenue to Airport Way, then goes directly to Boeing Field.

Our limousines pick up at the Olympic Hotel, forty-five minutes before departure and at the Traffic Office forty minutes prior to departure.

/s/ J. R. Wanink"

II.

The trial court erred in failing to include in its findings each and all of the following facts:

(1) Air line passengers being transported from Boeing Field were carried anywhere within the downtown district (bounded as set forth in finding XII) that they desired to go, and the limousines stopped anywhere within said district, at the request of a passenger, to let such passenger out (Tr. 61, 62, 109, 118, and 128).

(2) There were fifteen or more incoming and fifteen or more outgoing flights each day to and from Boeing Field (Tr. 58, 68, and 77).

(3) When the arrival of a plane was delayed the air line company would notify the Appellants' dispatcher of that fact, together with the estimated time of arrival of the delayed plane (Tr. 74).

(4) The information given Appellants' dispatcher by the air lines governed the departing time of Appellants' limousines. No trips were run without such orders from the air lines (Tr. 97 and 120).

(5) Appellants maintained no schedules of the departure of their limousine service (Tr. 103), and

they did not publish or post for the use or perusal of the general public schedules of the departures of the limousines from the airport or from the pickup points in the downtown area (Tr. 97).

(6) Appellants did not at any time advertise in the paper or by poster or in any manner their limousine service (Tr. 95).

(7) The schedules of the air line companies were used by the Appellants' dispatcher only for the purpose of planning so as to be able to handle the volume of expected transportation (Tr. 121).

(7½) The general public was not conveyed by means of the limousine service (Tr. 95 and 122).

(8) The air line companies had the power to specify the routes of travel, but they did not do so (Tr. 59, 96 and 99).

(9) Air line companies had the power to designate the pick-up points in the downtown area, and these were changed from time to time (Exhibit I—Contract with United Airlines; Tr. 63, 64, 69, 70, 96, 97 and 99).

(10) No public authority specified any route to be followed by Appellants' limousines, and Appellants had no certificate of convenience or necessity issued by Washington Department of Public Works or Department of Public Service (Tr. 94).

(11) No special facilities were provided at the airport for the limousines in receiving and unloading passengers. They performed this service in front of the administration building just as did the private cars and taxicabs, but while waiting at the airport the limousines would park in an area reserved for them and taxicabs (Tr. 64-67).

(12) Limousines not in use were stored at Appellants' garage located at 8th and Lenora (2109 8th Avenue) Seattle, Washington. Limousines dispatched to Boeing Field to meet incoming planes,

in most cases, went from Appellants' garage directly to field without going to or stopping at the downtown pick-up points. However, occasionally a car was dispatched from a hotel to meet an incoming plane (Tr. 119, 120 and 123).

(13) Although an airplane would be departing at a certain time, if the Appellants' dispatcher received no call for passengers to be transported to the plane, no limousine would be sent to the airport (Tr. 121).

(14) If all the passengers going to Boeing Field were at one downtown pick-up point the limousine would not go to any of the other downtown pick-up points before departing for Boeing Field (Tr. 117 and 129).

(15) When Boeing Field was closed down no limousine went there to transport passengers. They went directly to the alternate airport (Tr. 124),

for the reasons that each and all of the said facts are clearly established by uncontradicted evidence, and a proper and just determination of the question of whether or not Appellants' limousines were being "operated on an established line" within the meaning of *Sec. 3469* of the *Internal Revenue Code,* cannot be made without taking into consideration all of these facts, along with the other facts set forth in the findings made by the court, and on the further ground that inasmuch as the trial court undertook to make a detailed statement of the facts bearing upon the said question, it was the court's duty to have included each and all of the foregoing facts in its findings, and the Findings of Fact show that the Court did not take into consideration the foregoing facts in making its Conclusions of Law and enter-

ing a judgment dismissing the Appellants' complaint (Tr. 33).

III.

The trial court erred in making its Findings of Fact (Tr. 23-33) in that they are clearly erroneous for the reason they *omit* the material and uncontroverted facts set forth in Specification of Error II.

IV.

The trial court erred in treating *Regulation 42, Sec. 130.58* as though it had the force and effect of law (Tr. 147-153), for the reason that the said Regulation is no more than the Commissioner's interpretation of *Sec. 3469* of the *Internal Revenue Code,* and the regulation attempts to limit the meaning of the words "operated on an established line" used in said section of the *Internal Revenue Code.*

V.

The trial court erred in making its Conclusion of Law I which is as follows:

> "That during the period October 10, 1941, through September 30, 1944, the plaintiffs, in transporting passengers in their motor vehicles involved in this action, were operating said vehicles on an established line within the meaning of Section 3469 of the Internal Revenue Code (Title 26, U.S.C., Section 3469), and the Regulation promulgated thereunder." (Tr. 33)

for the reason that the evidence clearly shows Appellants were not operating their limousines "on an established line" within the meaning of said Code Section, and that

said conclusion is not supported by and is contrary to the evidence and is contrary to law, and on the further ground that said conclusion is based upon only a portion of the evidence, the facts set forth in Specification II having been disregarded.

VI.

The trial court erred in making its Conclusion of Law II which is as follows:

> "That the taxes assessed and collected were in all respects legal and in strict accordance with the law." (Tr. 34)

for the reason that *Sec. 3469* of the *Internal Revenue Code* expressly provides for the transportation tax imposed by said Code Section shall apply to transportation by motor vehicles such as said limousines "only when said vehicle is operated on an established line", and the said limousines during the times involved in this case were not operated on an established line within the meaning of said Code Section, and for the further reason that the said Conclusion is not supported by and is contrary to the evidence and is contrary to law and the trial court in making said Conclusion misconstrued the meaning of the term "operated on an established line", and on the further ground that said Conclusion is based on only a portion of the evidence, the facts set forth in Specification II having been disregarded.

VII.

The trial court erred in making its Conclusion of Law III which is as follows:

> "The judgment should be entered dismissing plaintiffs' complaint, with costs to the defendant to be taxed by the Court." (Tr. 34)

for exactly the same reasons as are specified in Specification VI.

ARGUMENT

Appellee's "Exhibit A-1" was erroneously admitted as evidence over Appellants' objection. (Tr. 62-63).

Appellants are not bound by Exhibit A-1, a letter which was not addressed to them, and the terms of which were in no way communicated to them. There is no evidence showing knowledge on the part of the Appellants of the existence or terms of said letter.

A letter written by a person not a party to the suit is hearsay and inadmissible.

In *Simpson v. Smith and Barnes,* (1882) 27 Kan. 565,575, where a letter written between persons not parties was attempted to be introduced, the court held it was properly excluded.

> "The letter from Dunscomb & Seaver was not itself the fact of possession, nor was it any fact, except that it was a mere letter; and as its contents were the mere statements of Dunscomb & Seaver, not under oath, its contents were incompetent to prove any fact or anything as against the defendants in the case."

In *McNairy v. Standard Life Ins. Co.,* (1938) 114 S.W. 2d 156, 158, a letter written by the Old Age Assistance Department to plaintiffs' attorney was offered in evidence. The court excluded the letter as evidence. In its opinion the court said:

> "It (the letter) was properly excluded by the ruling of the court. It was not competent for any purpose."

"Exhibit A-1" was erroneously admitted as evidence and should not be considered in determining whether the Appellants' operation was on an "established line" within the meaning of the Internal Revenue Code.

The Circuit Court of Appeals may review the evidence in this case.

This court has the authority to review the evidence in this case.

In *Equitable Life Assurance Society of the United States v. Irelan,* (1941) 123 F. 2d 462, 464 (C.C.A. 9), this court considered the scope of its authority to review findings. In the course of its opinion the court said:

> "Rule 52 (a) of the Rules of Civil Procedure, 28 U.S.C.A. following Section 723 c was intended to accord with the decision on the scope of the review in federal equity practice; . . ."

In the case of *Katz Underwear Co. v. United States,* (1942) 127 F. 2d 965, 966 (C.C.A. 3), the court said:

> "In a case tried without a jury Civil Procedure Rule 52(a), 28 U.S.C.A. following Section 723 c,

> governs. . . . This rule permits review to the extent formerly allowed in federal equity practice. 3 Moore's Federal Practice, Section 52.01, p. 3118. In equity if it clearly appeared that the court misapprehended the evidence its findings of fact may be set aside."

The term "established line" means the passage of public conveyances to and fro between distant points with regularity over a route established by governmental authority.

The ultimate question in this case is whether or not the Appellants, during the period October 1, 1941 to September 30, 1944, were operating their said limousines "on an established line" within the meaning of *Sec. 3469, I.R.C.* This is a mixed question of law and fact. Neither the statute nor the reports of the Congressional Committees have attempted to define the meaning of the term "on an established line".

When a Revenue Act does not define a term it contains, it becomes necessary to resort to the ordinary meaning of the words used in ascertaining the significance of the term in question.

In *Trenton Cotton Oil Company v. Comm.,* (1945) 147 F. 2d 33, 36 (CCA 6th), the court said:

> "The statute does not define the term 'stock or securities' and it is therefore necessary to resort in interpreting the provision to the common and ordinary meaning of these words."

Let us first consider the word "Line". In *Webster's Encyclopedic Dictionary* (1940) that word is said to mean—

> "A series of public conveyances, as buses, steamships, airplanes, & c., passing between places with regularity."

The above meaning was judicially approved in the case of *Bruce Transfer Company v. Johnson,* (1939) 227 Iowa 50, 53; 287 N.W. 278, 280.

> "What was the meaning of the word 'line' as so used at the time in question? Century Dictionary —1889—Line: 'A series of public conveyances, as coaches, steamers, packets and the like, passing to and fro between places with regularity.' . . . 'Stageline', 'railroad line' and 'automobile line' are expressions which are ordinarily understood to mean a regular line of vehicles for public use operated between distant points, or between different cities."

From these definitions we learn that a "line" means the passage of public conveyances to and fro between distant points with *regularity,* but we are dealing with more than merely a "line". Our immediate concern is with "an established line". Lexicographers state that the word "established" means to make stable, to settle on a firm or permanent basis.

A state statute using the words "established route" was construed in *Public Utilities Commission v. Pulos,* (1930) 75 Utah 527, 538; 286 Pac. 947, 952. The court relied on the general definition by lexicographers, but held a route could not be established by acts of private persons. In the course of its opinion, the court said:

> "It would seem reasonably clear that an established route must be a route that has a legal existence . . . It cannot well be said that a route along a public highway can be established by acts which are prohibited by law, nor by the acts of private persons or corporations."

From this it becomes apparent that there must not only be a "line"—a passage to and fro with *regularity,* but the "line" must be "established" in order to come within the provisions of the Revenue Code now under consideration. We have seen too that to be an "established line" the line must be established by some authority beyond that of private persons and corporations.

This is the common meaning of the term "established line" when used to indicate an established line of motor vehicles. In 1941, when this Revenue Act was passed, lines of motor vehicles were commonly established only by public authority. When Congress used the words "operated on an established line" it was referring solely to an established line of motor vehicles, consequently the only meaning that can be fairly ascribed to the said language selected by Congress is a line of motor vehicles established by proper public authority. There is nothing to indicate that Congress used the term with any other meaning in mind.

Appellants were not operating their limousine service on an "established line" within the meaning of Sec. 3469, I R C.

The statutes of the State of Washington, in force during the period with which we are concerned, regulat-

ing passenger transportation by motor vehicles, contained the following provisions:

> "The term 'commission' when used in this act means the public service commission of the State of Washington, or the director of public works or such other board or body as may succeed to the powers and duties now held by the public service commission." *(Sec. 6387 (c), Remington's Revised Statutes of Washington).*

and

> "No auto transportation company shall hereafter operate for the transportation of persons and, or, property for compensation between fixed termini or over a regular route in this state, without first having obtained from the commission under the provisions of this act a certificate declaring that public convenience and necessity require such operation; . . ." *(Sec. 6390, Remington's Revised Statutes of Washington).*

The Appellants were not operating their vehicles or their limousines "on an established line" as that term is used in *Sec. 3469, I. R. C.*

Mr. Wenck, as a witness in behalf of the Appellants, testified as follows:

> "Q. Now, has any public authority, the town, the City or the State of Washington specified a route for your company? A. No.
>
> Q. Do you hold from the State of Washington—I believe you call it in this state your Department of Public Works—maybe they've changed it to the Department of Public Service—one or the other, or both, do you hold any certificates of convenience or necessity from such department?

A. Not during that period.

Q. Well, have you ever held one for that particular run from town to the Boeing Field?

A. No.

Q. At no time? A. No." (Tr. 94, 95)

Finding XVI (Tr. 31) shows that Appellants' limousines were licensed as "for hire" vehicles under the laws of the State of Washington and were operated as "for hire" vehicles in the City of Seattle.

The City of Seattle maintains a city street bus line running from its metropolitan area to the Boeing Airport under the management of the Seattle Transit Commission, a Commission consisting of three people appointed by the Mayor of said City, and this city street bus line operates on an established time schedule over the city streets on a fixed route (Finding XV, Tr. 30-31). The public could rely on the regularity of this city bus line, but as we shall see from the facts hereinafter set forth the members of the general public wishing to travel between the downtown district of Seattle and Boeing Airport could not rely on the limousine service provided by the Appellants. In the first place, the service was only available to persons who had purchased air line tickets or to air line employees. In the second place, there was no assurance that a trip would even be made as weather or other conditions might cause the air line companies to order the limousines to proceed to an emergency air port, or to postpone or even to cancel a trip. Such uncertainty of operation is totally incompatible with the idea of an established line of transporta-

tion. Actually, the limousine service is subject to the call of the air line companies.

Regulation 42, Sec. 130.58 is an interpretive regulation, does not have the force of law, and cannot minimize the meaning of Sec. 3469 I R C.

Although the Commissioner has not attempted to define "an established line", he did promulgate *Regulation 42, Sec. 130.58,* in which he states his interpretation of what the term "operated on an established line" means, what it does not necessarily mean, and what it implies. The regulation provides:

> "The term 'operated on an established line' means operated with some degree of regularity between definite points. It does not necessarily mean that strict regularity of schedule is maintained; that the full run is always made; that a particular route is followed; or that intermediate stops are restricted. The term implies that the person rendering the service maintains and exercises control over the direction, route, time, number of passengers carried, etc. It implies also that the primary contract between the operator and the person served is for the transportation of the person and not for the hire or use of the vehicle."

Inasmuch as the negative statement in the above Regulation employing the term, "regularity of schedule" immediately follows the positive statement employing the phrase, "operated with some degree of regularity between definite points", it is reasonable to suppose that the positive statement likewise refers to "regularity of schedule". Thus, in defining the term, "operated on an

established line", the regulation requires definite points, and a schedule is presupposed.

Let us look again at the negative sentence commencing with the words, "It does not necessarily mean . . . ". To give logic and meaning to this sentence a regular established schedule between points must be presupposed; otherwise, the words "schedule", "full run", "particular route" and "intermediate stops" would be without significance. Where such a schedule between definite points has in fact been established and is in operation, then in the Commissioner's interpretation of the law one or more of the conditions set forth in the sentence under analysis would not necessarily mean that the vehicles in question were not being operated "on an established line".

As we have seen, the word "line" connotes regularity. To operate on a line would obviously mean to operate with regularity. That is the meaning of the language Congress used, but in the Regulation under discussion the Commissioner has attempted to whittle away this requirement. This he does not have the power to do.

In the case of *Morrill v. Jones,* (1882) 106 U.S. 466, 467; 1 S. Ct. 423, the Supreme Court in considering a regulation made by the Secretary of the Treasury with respect to a statute dealing with import duties said:

> "The Secretary of the Treasury cannot by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted."

In *Allis v. LaBudde*, (1942) 128 F. 2d 838, 840, (C.C.A. 7), the Commissioner by regulation approved by the Secretary of the Treasury attempted to limit the scope of a provision of the Internal Revenue Code. The court said:

> " . . . Although the Commissioner with the approval of the Secretary, is authorized to prescribe all needful regulations for the enforcement of Revenue Acts, it needs no argument that he cannot by such regulations, alter or amend an Act, or limit rights granted by it."

If Congress had intended to qualify the meaning of the word "line", it could easily have done so, and when it did not, we are compelled to act on the assumption that Congress used it with its ordinary meaning. And, if Congress had intended an interpretation of the term "on an established line" different from that ordinarily understood, that body could have easily expressed its intention in apt language.

Regardless of the correctness of Regulation 42, Sec. 130.58, the Appellants were not operating their limousines on an established line under the test set up in this Regulation.

Whether or not the Regulation correctly explains the meaning of an "operation" on an established line, the Appellants, by the very tests set up in the Regulation, were not operating their limousines "on an established line". As we observed the *Regulation* states:

> "The term 'operated on an established line' means operated with some degree of regularity between definite points."

In the case at bar the times of departure of the limousines were governed by the air lines and by weather conditions (Tr. 74, 75, 78, 92, 93, 97, 101, 116, 120). Whether or not a trip went from the down town area of Seattle to Boeing Field or to an emergency airport depended upon weather conditions, or whether Boeing Field was available for civilian use (Finding XIII, Tr. 29, 124). Running under such uncertain and fluctuating conditions could not be considered as an operation even with that "degree of regularity" contemplated by the Regulation, and most certainly would not be an operation with the regularity implied by the word "line" written into the statute by Congress.

There were no definite places in the downtown district of Seattle where passengers were discharged. The limousines would take a passenger to any place in the downtown district where he wanted to get out (Tr. 61, 62, 109, 118, 128). The places where passengers were "picked up" were not designated by the Appellants but by the air line companies to suit the convenience of their air passengers (Tr. 63, 64, 69, 70, 96, 97, 99). Under these circumstances the operation of the Appellants could not be regarded as having been between "definite points" within the meaning of the quoted portion of the Regulation.

The Regulation also provides:

> "The term (operation on an established line)

implies that the person rendering the service maintains and exercises control over the direction, route, time, number of passengers carried, etc."

The Appellants provided the transportation service, but the air lines controlled the direction, the route, the time of departure and the number of passengers to be carried (Tr. 59, 73, 74, 75, 78, 92, 95, 97, 99, 111, 116, 117, 120, 123). They controlled the direction of the route because they specified to which air field trips would be made from the downtown district, and if there were incoming passengers they specified the air field from which the passengers would be transported to the downtown district. The time of the limousine trips was controlled entirely by the air line companies, and depended upon the times of the scheduled take-offs and landings of the planes, and delays such as caused by adverse weather (Tr. 65, 73, 74, 75, 93, 97, 99, 111, 116, 117). The air line companies controlled the number of persons because the service was limited to passengers with air line tickets and employees of air lines (Tr. 65, 95, 122). Thus tested, the Appellants did not have the control which the Regulation says is implied in the term "operated on an established line". In other words, tested by the Regulation the Appellants did not have the control necessary to constitute an "operation on an established line".

The same Regulation also says that the term "operated on an established line" implies:

"that the primary contract between the operator and the person served is for the transportation of

the person and not for the hire or use of the vehicle."

The trial court found as a fact (Finding VII, Tr. 26) that Appellants were to provide "transportation service", which, of course, agrees with the parties agreed facts (No. 7, Tr. 9) that "limousine service" was to be provided. The facts which are not disputed and which show that Appellants did not have the requisite control will likewise prove conclusively that Appellants provided only cars and drivers at the request of the airlines.

Appellants did not establish any points between which to operate (Tr. 92, 96, 97, 109, 117, 118, 120, 124, 128). They did not prepare or publish any schedule under which to operate (Tr. 103). The facts show that they did not maintain any control over the external factors normally present in the transportation of persons. They simply furnished cars and drivers and followed the orders given by the air lines, which most certainly is not the operation of "an established line" of motor vehicles contemplated by the statute.

The Findings of Fact are clearly erroneous in that they omit material, uncontroverted facts clearly showing Appellants were not "operating" their limousines "on an established line".

Appellants are not subject to transportation taxes on account of the limousine service furnished by them to the air lines.

In this case we are confronted with an unusual situation. The trial court may have gone into more detail in its Findings than is contemplated by *Rule 52* of the *Federal Rules of Civil Procedure,* but once having undertaken the task of making detailed and specific findings of the facts upon which it would base its conclusion as to whether or not Appellants were operating their limousines "on an established line", it is submitted that it became the court's duty to make findings upon *all* such facts rather than only upon some of them. This the court did not do. It went into minute detail concerning vehicles not involved in this action (Finding VIII, Tr. 26), the color of paint and detachable and permanent signs on the vehicles (Finding IX, Tr. 27), but failed to make findings upon the more important and uncontroverted facts hereinbefore detailed in Specification of Error II that have a direct bearing upon whether or not the Appellants' limousines were being operated "on an established line".

The trial court said that its Conclusions of Law were based upon the facts it found (Tr. 33). Its first conclusion is that the Appellants were operating their limousines "on an established line" within the meaning of *Sec. 3469, I R C* (Tr. 33, 34). From this it conclusively appears that the Conclusion (whether regarded as an ultimate fact or as a conclusion of law) is based on only a selected portion of the material facts that bear upon the principal question in this case.

The Appellants are aware that *Rule 52 (a), F R C P,* provides:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

In this case we have a situation wherein the findings are clearly erroneous. Not erroneous in the sense that the facts are not accurate but in the equally vital sense that they are unfair and prejudicial because of the said omissions.

If Conclusion of Law I (Tr. 33, 34) should be regarded as an ultimate fact rather than a conclusion of law, it would still be clearly erroneous because it is contrary to the evidence in this case. When the uncontroverted facts summarized in Specification II, and elsewhere referred to in this brief are added to the facts found by the court, it becomes readily apparent that the Appellants, in providing limousine service to the air lines, were not "operating" motor vehicles "on an established line" within the meaning of *Sec. 3469, I R C.* Their limousine service came clearly within the stautory exception, consequently they were and are not liable for the purported transportation taxes, penalties and interest assessed against them.

Conclusions of Law I, II and III, not being supported by the evidence and being contrary to the evidence and the law, are clearly erroneous.

CONCLUSION

From the foregoing analysis of the law and the evidence, it is apparent that all of the Conclusions of Law made by the trial court, and the trial court's decision and judgment dismissing the Appellants' complaint with prejudice are clearly erroneous and that the judgment of the trial court should be reversed.

Respectfully submitted,

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